DOCKET FILE COPY ORIGINAL

RECEIVED

SEP 30 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications	)	**CC Docket No. 96-98**
Act of 1996	)	
	)	
Section IX. C. -- Definition of	)	
Telecommunications Carrier	)	

To: The Commission

UTC PETITION FOR CLARIFICATION

Pursuant to Section 1.429 of the Federal Communications Commission's (FCC) Rules, UTC, The Telecommunications Association (UTC),[1] hereby submits a Petition for Clarification of the Commission's *First Report & Order (FR&O)*, FCC 96-325, released August 8, 1996, in the above-captioned proceeding to implement the "interconnection" provisions of the Telecommunications Act of 1996.[2]

UTC is the national representative on communications matters for the nation's electric, gas and water utilities and natural gas pipelines. Over 1,000 such entities are members of UTC, and include investor-owned utilities, municipal electric systems, rural

---

[1] UTC was formerly known as the Utilities Telecommunications Council.

[2] The *FR&O* was published in the Federal Register on August 29, 1996, 61 Fed. Reg. 45476.

electric cooperatives, and natural gas distribution and transmission companies. As the principal representative of the utilities directly impacted by the Commission's interpretation and implementation of the Telecommunications Act of 1996, UTC participated in this rulemaking by filing Comments and has a direct interest in this proceeding.

I. The FCC Should Clarify That The Provision Of Capacity On A Private Carrier Basis Does Not Constitute The Offering Of A Telecommunications Service

UTC's petition is limited to a clarification of the FCC's interpretation of the term "telecommunications service" as that term is defined in the Telecommunications Act of 1996. Section 3 of the Telecommunications Act of 1996 defines "telecommunications service" as:

> *The offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.*

Based on this statutory definition, in Section IX.C of the *FR&O* the FCC concluded that entities that operate private, internal communications systems and which do not offer service to third parties for a fee are not "telecommunications service" providers. Likewise, the FCC determined that cost-sharing for the construction and operation of private telecommunications networks is not within the definition of "telecommunications service."[3]

[3] *FR&O*, para. 994.

However, in the last sentence of paragraph 994 of the *FR&O* as adopted the FCC implied that it will henceforth treat infrastructure leasing arrangements (*e.g.*, the lease of dark fiber) or "private carrier" arrangements as common carrier telecommunications service offerings:

> *"For example, the furnishing of infrastructure to the public for the provision of telecommunications services (e.g., selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a)."*

Subsequent to the release of the *FR&O*, the Chief of the Commission's Common Carrier Bureau released an *Errata* which revised paragraph 994 as follows:

> *"Providing to the public telecommunications (e.g., selling excess capacity on private fiber or wireless networks), constitutes a telecommunications service and thus subjects the operator of such a network to the duties of section 251(a) to that extent."*[4]

While this revision correctly eliminates the reference to "the furnishing of infrastructure" as a regulated common carrier activity, and even though it clarifies that an entity will be subject to common carrier requirements only "to the extent" that the entity provides service to "the public," the sentence could be misconstrued as meaning that the provision of telecommunications or capacity constitutes a "telecommunications service," regardless of the manner in which it is offered. Under a long-line of FCC and court precedents, regulated "common carriers" have been distinguished from unregulated "private carriers" based on their indiscriminate holding-out to the public to provide

---

[4] *Errata,* DA 96-1321, released August 19, 1996.

service.[5] By defining "telecommunications service" in the Telecommunications Act by reference to the "offering of telecommunications for a fee directly to the public," Congress seemed to be carrying forward *NARUC I's* concept of an indiscriminate holding out to the general public.[6] Moreover, it is significant to note that the Telecommunications Act of 1996, did not alter the statutory definition of a "common carrier," which was further explained in *NARUC I.*

Far from a mere exercise in semantics, the implications of the FCC's interpretation are very real for a large number of utilities, pipelines and other entities that have provided, or intend to provide, telecommunications capacity or facilities under long-term leasing agreements with third-party telecommunications service providers. These facilities are provided pursuant to privately negotiated, individualized contracts, under the assumption that the underlying facility provider will not be regulated as a common carrier. In the face of common carrier regulations many utilities and others will elect not to make

---

[5] *See, NARUC v. FCC (NARUC I)*, 525 F 2d 630 (1976).

[6] As noted in UTC's Comments in this proceeding, the "effectively available" language was included to ensure that providers who offer service directly to certain broad classes of end users, rather than the public-at-large, are included within the scope of the definition. In this way, carriers who directly serve a sufficiently large segment of the public so as to make their service effectively available directly to a substantial portion of the public are considered telecommunications service providers. The "effectively available" clause is not intended to capture services that are indirectly offered to the general public, but instead the language is aimed at distinguishing between services that are directly offered to a discrete class of users and direct offerings of service to a sufficient size and class of end-users so as to effectively constitute service to the "public."

telecommunications capacity available, which will result in a dramatic cut-back in the amount of facilities based competition in telecommunications.[7]

Accordingly, UTC urges the FCC to clarify that the "private carrier" option as defined under *NARUC I* remains viable.[8] Specifically, the Commission should indicate that the revised last sentence of paragraph 994 (and particularly the parenthetical example) should be read in the full context of the entire paragraph; that is, the lease of capacity on a private fiber or microwave system does not constitute a "telecommunications service" except to the extent the operator is "offering 'telecommunications' for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."

Such an interpretation would be consistent with the FCC's continued application of the *NARUC I* criteria in determining common carrier and private carriage status in the months since the passage of the Telecommunications Act of 1996. For example, on June 12, 1996, the FCC's International Bureau released an *Order* authorizing a cable landing license to FibreCaribe between Florida and the Cayman Islands on a non-common carrier basis.[9] In making this decision the International Bureau specifically relied upon and quoted the *NARUC I* standard stating:

---

[7] Rather than a simple corporate decision as to whether or not to be regulated as a common carrier, many local, state and Federal utilities that currently lease fiber capacity are prohibited as a matter of law from acting as common carriers.

[8] In their *Federal Communications Law Journal* article, "Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative," Volume 48, No.3 (June 1996), Peter K. Pitsch and Arthur W. Bresnahan conclude that private carriage as defined by *NARUC I* continues to be a viable alternative under the Telecommunications Act of 1996.

[9] FiberCaribe, Inc., File No. S-C-L-95-007, DA 96-857, 11 FCC Rcd 6898 (June 1996).

> *[S]ince FiberCaribe will make "individualized decisions, whether and on what terms to deal" and does not undertake to "carry for all people indifferently," there is no reason to expect that the proposed cable circuits would be held out to the public by FiberCaribe indifferently. We thus conclude that FiberCaribe will not in fact offer capacity to the public on a common carrier basis, and thus is not subject to regulation under Title II of the Communications Act.*[10]

Similarly, on August 29, 1996, the FCC's Wireless Telecommunications Bureau released an *Order and Authorization* allowing Shell Offshore Services Company to operate a digital microwave station on a common carrier basis.[11] In rejecting a petition to deny the application as not being a common carrier service, the Bureau specifically looked to *NARUC I* and found that Shell satisfied *NARUC I's* requirement for common carriage, because, Shell "expressly state[d] that service will be provided to any member of the public on a nondiscriminatory basis."

Finally, it should be noted that the new Part 101 Rules, adopted on February 29, 1996, for the private and common carrier microwave services, explicitly carry forward the ability of entities to be licensed as private carriers. Section 101.135 allows private microwave licensees to "offer service on a for-profit private carrier basis." Consistent with *NARUC I*, Part 101 requires that private carriage arrangements be conducted pursuant to written agreements.[12]

---

[10] FiberCaribe, Inc., 111 FCC Rcd. 6900-6901.

[11] Shell Offshore Services, *Order and Authorization*, Application File Nos. 9602964 through 9603061, DA - 1458.

[12] 47 C.F.R. Part 101.135(c).

II. Conclusion

Based on the above, the FCC should clarify that the provision of capacity on a private carrier basis does not constitute the offering of a telecommunications service. Specifically, the Commission should indicate that the revised last sentence of paragraph 994 (and particularly the parenthetical example) should be read in the full context of the entire paragraph; that is, the lease of capacity on a private fiber or microwave system does not constitute a "telecommunications service" except to the extent the operator is "offering 'telecommunications' for a fee directly to the public."

WHEREFORE, THE PREMISES CONSIDERED, UTC respectfully requests the FCC to clarify the last sentence of paragraph of 994 contained in Section IX.C of the *FR&O* with regard to term "telecommunications service" in a manner consistent with this petition.

Respectfully submitted,

UTC

By: 

Jeffrey L. Sheldon
General Counsel

Sean A. Stokes
Senior Staff Attorney

UTC
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036
(202) 872-0030

September 30, 1996.

CERTIFICATE OF SERVICE

I, Ryan Oremland a legal assistant of UTC, *The Telecommunications Association*, hereby certify that I have caused to be sent, by hand-delivery, on this 30th day of September 1996, a copy of the foregoing to each of the following:

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

The Honorable James H. Quello
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Gina Keeney
Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Suite 500
Washington, D.C. 20554

Richard Metzger
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, D.C. 20554

Ryan Oremland